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March 21, 1995

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

William F. Caton, Acting Secretary
Federal Communications Commission
Washington, DC 20554

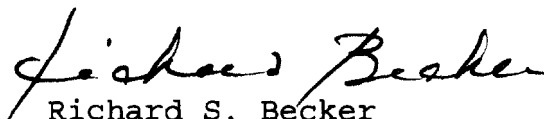
Re: In re Application of Ellis
Thompson Corporation for
Facilities in the Domestic
Public Cellular Radio
Telecommunications Service on
Frequency Block A in Market No.
134, Atlantic City, New Jersey
CC Docket No. 94-136
File No. 14261-CL-P-134-A-86

Dear Mr. Caton:

Transmitted herewith on behalf of Ameritel is one (1) original and six (6) copies of its Response filed with respect to the above-referenced proceeding.

Should any questions arise with respect to this matter, please communicate directly with this office.

Respectfully submitted,



Richard S. Becker
Attorney for Ameritel

Enclosures

No. of Copies rec'd
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of)	CC DOCKET NO. 94-136
)	
ELLIS THOMPSON CORPORATION)	File No. 14261-CL-P-134-A-86
)	
For Facilities in the)	
Domestic Public Cellular)	
Radio Telecommunications)	
Service on Frequency Block A)	
in Market No. 134, Atlantic)	
City, New Jersey)	

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To: **Administrative Law Judge Joseph Chachkin**

RESPONSE

Ameritel ("Ameritel"), by its attorneys and pursuant to Section 1.294(d) of the Commission's Rules,¹ hereby submits this Response to pleadings filed by parties to the above-captioned proceeding opposing the "Petition To Intervene" ("Petition") filed by Ameritel on February 6, 1995.²

1. In its Petition, Ameritel sought leave to intervene as a party in interest in the above-captioned proceeding. Ameritel demonstrated that intervention should be granted as a matter of right pursuant to Section 1.223(a) of the Commission's Rules³ because Ameritel is the successor-in-interest to Ameritel, Inc., a mutually-exclusive ("MX") applicant for the Atlantic City, New Jersey, Metropolitan Statistical Area ("MSA") nonwireline cellular authorization ("Authorization") that was selected fifth in the lottery for the Authorization held by the Commission on April 21,

¹47 C.F.R. §1.294(d).

²Filed simultaneously herewith is a "Motion For Leave To File Response" ("Motion") seeking leave to file the instant Response. As demonstrated in the Motion, good cause exists for acceptance and consideration of the instant Response.

³47 C.F.R. §1.223(a).

1986.⁴

2. In "Comments On Petition To Intervene" ("Comments") filed jointly by The Wireless Telecommunications Bureau ("Bureau") and Telephone and Data Systems, Inc. ("TDS") on February 15, 1995, the Bureau and TDS requested that "Ameritel be directed to make a complete showing with respect to its alleged status...."⁵ In an "Opposition To Petition For Leave To Intervene" ("Amcell Opposition") filed on February 15, 1995, by American Cellular Network Corp. ("Amcell"), Amcell opposed Ameritel's Petition, but also requested that Ameritel be required to "substantiate its claim that it is the 'successor' to Ameritel, Inc...."⁶ Finally, on February 21, 1995, the Ellis Thompson Corporation ("ETC"), itself the successor-in-interest to the original Atlantic City MX applicant, Ellis Thompson ("Thompson"),⁷ submitted its "Opposition To Petition To Intervene" ("ETC Opposition"). In the ETC Opposition, ETC opposed Ameritel's Petition, but also requested that Ameritel be required to provide additional information "to demonstrate its basis for intervention as a matter of right...."⁸

⁴Petition, ¶¶1-5; see also 47 U.S.C. §309(e); Algreg Cellular Engineering, CC Docket No. 91-142 6 FCC Rcd 5299, 5300 (Rev.Bd. 1991) (hereinafter "Algreg"); Virginia Communications, Inc., 2 FCC Rcd 1895 (1987); Elm City Broadcasting Corporation v. United States, 235 F.2d 811, 816 (D.C.Cir. 1956). In its Petition, Ameritel also demonstrated that it should be permitted to intervene to assist in determination of the issue designated in the above-captioned proceeding. Petition at ¶6-9.

⁵Comments, p.4.

⁶Amcell Opposition, p.3.

⁷See Petition at n.6.

⁸ETC Opposition, p.4.

3. Ameritel is truly disturbed at the speculative and dilatory nature of the allegations in the Comments, Amcell Opposition and ETC Opposition.⁹ In their rush to oppose Ameritel's right to intervene in the above-captioned proceeding, the Existing Parties all relied on misleading and inaccurate conjecture to attempt to contradict Ameritel's clear and still-unrebutted demonstration in its Petition that Ameritel is "an Ohio general partnership that is the successor-in-interest to Ameritel, Inc.," the fifth-ranked MX applicant for the Authorization.¹⁰ Ameritel's showing was specifically supported by a Declaration under penalty of perjury by a general partner in Ameritel and this showing more than adequately demonstrates that Ameritel is an MX applicant with standing to intervene as a matter of right pursuant to Commission Rules and precedent.¹¹

4. Ameritel recognizes that pursuant to Section 1.294(b) of the Commission's Rules, Ameritel does not have the right to reply to the Oppositions.¹² Accordingly, Ameritel is not in this Response attempting to reply to the arguments raised by the Existing Parties in the Oppositions. However, in the interest of expediting resolution of this interlocutory issue and to respond to the campaign of disinformation launched by the Existing Parties in

⁹For ease of reference: (1) the Comments, Amcell Opposition and ETC Opposition may be referred to collectively hereinafter as the "Oppositions;" and (2) the Bureau, TDS, Amcell and ETC may be referred to collectively hereinafter as the "Existing Parties."

¹⁰Petition at n.7.

¹¹47 C.F.R. §1.223(a); 47 U.S.C. §309(e); Algreg, 6 FCC Rcd at 5299.

¹²47 C.F.R. §1.294(b).

the Oppositions, Ameritel is voluntarily providing information that dispels the questions and suspicions that the Existing Parties attempted to raise regarding Ameritel's right to intervene in the above-captioned proceeding.

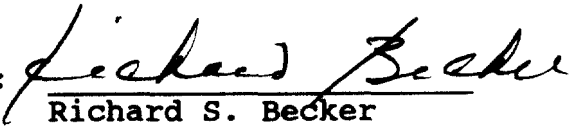
5. Attached hereto as Exhibit 1 is a Declaration ("Rawlings Declaration") by Thomas E. Rawlings, one of the four (4) general partners in Ameritel and corporate Secretary for Ameritel, Inc. The Rawlings Declaration fully and conclusively refutes all of the insinuations and conjecture that the Existing Parties threw into the Oppositions. Ameritel demonstrated in its Petition that it is entitled to intervene as a matter of right in the above-captioned proceeding as the successor-in-interest to fifth-ranked MX applicant, Ameritel, Inc. Ameritel has now shown that all of the questions raised by the Existing Parties were nothing more than misguided attempts to obstruct the rightful inclusion of Ameritel as a party who can assist in the full and complete examination of the issue designated in the above-captioned proceeding.¹³

¹³It should also be noted that attempts by the Existing Parties to treat Ameritel as the tentative selectee for the Authorization must be rejected. For example, Amcell's citation to Section 22.108 of the Commission's Rules to support its claim that Ameritel is required to submit a partnership agreement is completely misplaced. Amcell Opposition at n.4. Section 22.108 requires disclosure of certain information by applicants. 47 C.F.R. §22.108. In the event that the above-captioned ETC application is dismissed, the second-, third- and fourth-ranked applications for the Atlantic City Authorization are also dismissed, and the Ameritel's Atlantic City application is designated as the tentative selectee for the Authorization, Ameritel stands ready to amend its application to reflect the facts set forth in the Rawlings Declaration regarding the ownership of Ameritel, Inc. and Ameritel. At this time, however, Ameritel is only required to demonstrate that it is entitled to intervene in the above-captioned proceeding as an MX applicant. Ameritel met this burden in its Petition and this Response rebuts the conjecture set forth in the Oppositions with respect to Ameritel's status as successor-in-interest to Ameritel,

WHEREFORE, for all of the foregoing reasons, Ameritel hereby respectfully submits this Response to expedite consideration of Ameritel's Petition and to refute the inaccurate conjecture and insinuations raised by the Existing Parties in their Oppositions.

Respectfully submitted,

AMERITEL

By: 
Richard S. Becker
James S. Finerfrock
Jeffrey E. Rummel

Its Attorneys

Richard S. Becker & Associates, Chartered
1915 Eye Street, Northwest
Eighth Floor
Washington, DC 20006
(202) 833-4422

Date: March 21, 1995

Inc. Similarly, allegations by Existing Parties that Ameritel must demonstrate compliance with Section 22.944 of the Commission's Rules at this time are also inaccurate. Comments at n.2; Amcell Opposition at n.5; ETC Opposition at 4. Section 22.944, which only became effective on January 1, 1995, limits (but does not prohibit) transfers of interests in cellular applications. 47 C.F.R §22.944; Report and Order, CC Docket No. 92-115, 9 FCC Rcd 6513 (1994). [The prior version of this rule, Section 22.922, applied only to Rural Service Area ("RSA") cellular applications and not to applications for Metropolitan Statistical Areas, like the Atlantic City MSA. Report and Order, CC Docket No. 90-258, 7 FCC Rcd 7539 (1992).] If Ameritel ultimately becomes the tentative selectee for the Authorization, Ameritel will, if necessary, utilize the facts set forth in the Rawlings Declaration to demonstrate that any ownership changes were permissible under Commission Rules and did not constitute a substantial change in ownership or control of the Atlantic City application. Even though the Rawlings Declaration demonstrates that the succession of Ameritel to ownership of the Atlantic City application originally filed by Ameritel, Inc. was pro forma in nature, this showing is not required at this time to demonstrate that Ameritel is entitled to intervene in the above-captioned proceeding as a matter of right as the fifth-ranked MX applicant for the Authorization.

Exhibit 1

AFFIDAVIT OF THOMAS E. RAWLINGS

AFFIDAVIT OF THOMAS E. RAWLINGS

THOMAS E. RAWLINGS, being first duly sworn, depose and say:

1. I am presently, and have been continuously since 1977, an attorney admitted to the practice of law in the State of Ohio.

FORMATION OF AMERITEL, INC., AN OHIO CORPORATION

2. On July 15, 1983 the Ohio Secretary of State issued to METROTEC, INC. an Ohio Service Mark Registration for the Service Mark AMERITEL. On February 15, 1984 the Ohio Secretary of State approved and recorded an ASSIGNMENT dated February 12, 1984 from METROTEC, INC. to Gene A. Folden of all right, title and interest in that mark. On February 15, 1984 the Ohio Secretary of State issued to Gene A. Folden Ohio Service Mark Registration No. 5057 for the Service Mark AMERITEL (**Exhibit 1** hereto).

3. Pursuant to instructions from Gene A. Folden in early 1986, I prepared Articles of Incorporation with Mr. Folden as the sole incorporator for an Ohio corporation to be known as AMERITEL, INC. (hereinafter called AMERITEL (OH)), and, under cover of a letter dated February 3, 1986 (**Exhibit 2** hereto), sent via overnight delivery the Articles of Incorporation and related items to the Ohio Secretary of State.

4. Ohio Revised Code Section 1701.04(D) in effect on February 3, 1986 stated "The legal existence of the corporation shall begin upon the filing of the articles and, unless the articles otherwise provide, its period of existence shall be perpetual."

5. On February 6, 1986, the date on which AMERITEL (OH) filed its application for the Atlantic City, New Jersey Metropolitan Statistical Area nonwireline cellular authorization (hereinafter called the "Atlantic City Application"), the Articles of Incorporation for AMERITEL (OH) had been previously filed with the Ohio Secretary of State.

6. Subsequent to February 6, 1986, the Articles of Incorporation and related items were returned to me. The sole basis for this was that the proposed name AMERITEL, INC. was not available without the written consent of Metrotec, Inc.

7. The day I received the returned Articles of Incorporation and related items I contacted the Office of the Ohio Secretary of State. In a telephone conversation with a representative of the Ohio Secretary of State I was told that:

(a) on and before February 3, 1986 the owner of record of the Ohio Service Mark Registration for AMERITEL was Gene A. Folden,

(b) the clerk who processed the Articles of Incorporation erroneously failed to check the assignment records to identify the then current owner of the Ohio Service Mark Registration for AMERITEL,

(c) the return of the Articles of Incorporation and related items was done in error by the Secretary of State solely because of the error by the processing clerk, and,

(d) The Ohio Secretary of State had no procedure for correcting the appearance of an erroneous filing date on an issued Certificate reflecting filing and recording of articles of incorporation.

8. Promptly after speaking with the aforementioned representative of the Ohio Secretary of State, I returned to the Ohio Secretary of State the same Articles of Incorporation and related items originally filed. The Ohio Secretary of State completed its processing of the Articles of Incorporation and, on February 21, 1986 issued a Certificate reflecting filing and recording of the Articles of Incorporation.

REDEMPTION OF VARIOUS AMERITEL (OH) SHAREHOLDERS

9. In April of 1987 AMERITEL (OH) redeemed the stock owned by all of its then current shareholders except for Gene A. Folden, Thomas E. Rawlings, David C. Rowley and Richard D. Rowley (hereinafter collectively called the "Shareholders").

ASSIGNMENT OF DAYTONA BEACH CONSTRUCTION PERMIT AND ATTEMPTED FORMATION OF AMERITEL, INC., A DELAWARE CORPORATION

10. On October 21, 1987 AMERITEL (OH), to whom the Federal Communications Commission (hereinafter called "FCC") had previously awarded the Construction Permit for the Daytona Beach, Florida Metropolitan Statistical Area (hereinafter called the "Daytona Beach CP"), filed an application for FCC consent to assign its Daytona Beach CP to Crowley Cellular Telecommunications (Daytona), L.P. (hereinafter called "CCT").
11. On December 10, 1987 the FCC consented to the assignment of the Daytona Beach CP from AMERITEL (OH) to CCT.
12. The Shareholders of AMERITEL (OH) planned to form a Delaware Corporation, which they intended to be named Ameritel, Inc.
13. On January 19, 1988 AMERITEL (OH) filed an application seeking the FCC's consent to the *pro forma* assignment of control of the Daytona Beach CP from AMERITEL (OH) to a corporation *to be* formed under Delaware law and intended *to be* known as AMERITEL, INC. (hereinafter called AMERITEL (DE)). Exhibit 2 of that application states in its entirety:

The instant proposed assignment involves only an Ameritel, Inc. proposal to change its state of incorporation, from Ohio to Delaware. The change in its state of incorporation *will be* accomplished by a statutory merger, under Delaware and Ohio law, of the Ohio corporation into a Delaware Corporation formed for the sole purpose of receiving all the assets and liabilities of the Ohio corporation and thereby accomplish the change in state of incorporation.

There *will be* no de facto or de jure change in control of Ameritel, Inc. The shareholders of the Delaware Corporation and their respective ownership interests *will be* exactly the same as in the Ohio Corporation.

The purpose of the change is to permit the shareholders, officers and directors of the Ameritel, Inc. more liberal provisions of Delaware Corporate law. [Emphasis Added.]

14. Upon inquiry to the Delaware Secretary of State, I was informed that the name AMERITEL, INC. was not available in the State of Delaware. Because AMERITEL, INC. was not available, the Shareholders of AMERITEL (OH) chose METROTEC, INC. as the name of the Delaware corporation into which AMERITEL (OH) would be merged.
15. The name METROTEC, INC. was available in the State of Delaware, and, effective January 21, 1988 a Delaware Corporation known as METROTEC, INC. (hereinafter called METROTEC (DE)) was formed and entered into an agreement by which AMERITEL (OH) would be merged into METROTEC (DE).
16. On January 29, 1988 the FCC consented to the *pro forma* assignment of control of the Daytona Beach CP from AMERITEL (OH) to AMERITEL (DE). Control of the Daytona Beach CP was never assigned to AMERITEL (DE).
17. On February 9, 1988 CCT informed the FCC of the consummation of the assignment of the Daytona Beach CP from AMERITEL (OH) to CCT.

MERGER OF AMERITEL (OH) INTO METROTEC (DE)

18. On June 15, 1988 the agreement by which AMERITEL (OH) was to merge into METROTEC (DE) was filed with the Delaware Secretary of State, effecting the merger.

LIQUIDATION OF METROTEC (DE)

19. Later in 1988 METROTEC (DE) distributed all of its assets (including the Atlantic City Application) to the Shareholders.

FORMATION OF AMERITEL, AN OHIO GENERAL PARTNERSHIP

20. Gene A. Folden, Thomas E. Rawlings, David C. Rowley and Richard D. Rowley formed a general partnership under the laws of the State of Ohio known as AMERITEL (hereinafter called AMERITEL GP (OH)).
21. In relevant part Ohio Revised Code Section 1329.01(A)(2) in effect from 1977 continuously to the present states " *'Fictitious Name' means a name used in business or trade that is fictitious and that the user has not registered or is not entitled to register as a trade name.*" (Emphasis added.)

22. Gene A. Folden is the owner of Ohio Service Mark Registration No. 5057 for the mark AMERITEL, currently in force until its expiration on July 15, 2003, all as reflected in a Certificate issued by the Ohio Secretary of State on October 25, 1993 (**Exhibit 3** hereto). Gene A. Folden, a general partner of AMERITEL GP (OH), has consented to the registration of AMERITEL as a trade name of AMERITEL GP (OH).

1993 AMERITEL, INC.


23. The COMMENTS ON PETITION TO INTERVENE filed in In re Application of ELLIS THOMPSON CORPORATION by The Wireless Telecommunications Bureau and Telephone and Data Systems, Inc. included as Attachment G a document that is captioned ARTICLES OF INCORPORATION OF AMERITEL, INC. and purports to be an Ohio Corporation formed in July of 1993.
24. I was not aware of this purported corporation prior to receipt of a copy of that document. I have no relationship whatsoever to this purported corporation. Upon information and belief, Gene A. Folden, David C. Rowley and Richard D. Rowley have no relationship whatsoever to this purported corporation.

Further Affiant sayeth not.


Thomas E. Rawlings

State of Ohio)
)
County of Summit) ss

SUBSCRIBED and SWORN to before me this 16th day of March, 1995.


Notary Public

HOWARD S. ROBBINS, Attorney-At-Law
Notary Public, State of Ohio
My Commission Has No Expiration Date
Section 147.03 R.C.

MAR 8 1984

Department of State

The State of Ohio

F0406-1007

Sherrod Brown
Secretary of State

SM 5057

Certificate

It is hereby certified that the Secretary of State of Ohio has custody of the Records of Incorporation and Miscellaneous Filings; that said records show the filing and recording of: SMA

of:

3 MAR 11:58 TEL

APPLICANT/ASSIGNEE: GENE A. FOLDEN
ADDRESS: 55 SHIAWASSEE AVE.
AKRON, OH 44313

STATE OF INCORP: NA

DATE OF 1ST USE: 01/20/83

EXPIRATION DATE: 7/15/93

CLASS OF FILING: 38

United States of America
State of Ohio
Office of the Secretary of State

Recorded on Roll F406 at Frame 1008 of
the Records of Incorporation and Miscellaneous Filings.

Witness my hand and the seal of the Secretary of State, at the
City of Columbus, Ohio, this 15TH day of FEB,

A.D. 19 84.



Sherrod Brown
Sherrod Brown
Secretary of State

Exhibit 1

LAW OFFICES
BLAKEMORE, ROSEN, MEEKER & VARIAN CO., L. P. A.

277 SOUTH BROADWAY

AKRON, OHIO 44308

TELEPHONE (216) 253-3337

ROBERT W. BLAKEMORE
BERNARD I. ROSEN
MICHAEL B. HENDERSON
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DONALD S. VARIAN, JR.
HOWARD L. MENTZER
JAMES F. BURKE
DAVID A. LOONEY
DAVID A. LITENBERG

PATRICK J. HART
THOMAS E. RAWLINGS
MICHAEL B. ROWLER
LAWRENCE T. WILLEMEN
MICHAEL R. BRINSON
GARY M. KOTEN
KENNETH E. WITTENAUER
THOMAS W. MISAKKA
LINDA B. MINIZER

February 3, 1986

Secretary of the State of Ohio
Corporate Division, 14th Floor
30 East Broad Street
Columbus, Ohio 43215

Re: AMERITEL, INC.

Gentlemen:

I am forwarding to you the following documents with the request that they be filed so as to be effective immediately.

1. Articles of Incorporation of AMERITEL, INC.
2. An appointment by Gene Folden, Incorporator of AMERITEL, INC., appointing Thomas E. Rawlings as original agent for the service of process of this corporation.
3. Our check payable to the Secretary of the State of Ohio in the amount of \$75.00 in payment of the filing fee of the aforementioned documents.

Would you kindly advise me by telephone, collect at (216) 253-3337, if these documents are not in order.

Thank you for your courtesy and cooperation.

Sincerely,

Thomas E. Rawlings
Thomas E. Rawlings

TER:mac
Enclosures



The State of Ohio

Bob Taft

Secretary of State

SM 5057

Certificate

It is hereby certified that the Secretary of State of Ohio has custody of the Records of Incorporation and Miscellaneous

Filings; that said records show the filing and recording of: SMR

of:

"AMERITEL"

APPLICANT/ASSIGNEE: GENE A. FOLDEN
ADDRESS: 798 NE 35TH ST
BOCA RATON FL 33431

STATE OF INCORP: NA

DATE OF 1ST USE:
EXPIRATION DATE: 07/15/2003
CLASS OF FILING: 38

United States of America
State of Ohio
Office of the Secretary of State

Recorded on Roll 9312 at Frame 1727 of
the Records of Incorporation and Miscellaneous Filings.

Witness my hand and the seal of the Secretary of State at

Columbus, Ohio, this 25TH day of OCT

A.D. 1993 .



Bob Taft

Bob Taft
Secretary of State

Exhibit 3

CERTIFICATE OF SERVICE

I, Jeffrey E. Rummel, an associate in the law firm of Richard S. Becker & Associates, Chartered, hereby certify that I have on this 21st day of March, 1995, sent by First Class United States mail, postage prepaid, copies of the foregoing "RESPONSE" to the following:

Honorable Joseph Chachkin*
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2000 L Street, N.W.
Washington, DC 20554

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Terrence E. Reideler, Trial Attorney*
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Enforcement Division
Federal Communications Commission
1919 M Street, N.W.; Room 644
Washington, DC 20554

Regina Keeney, Chief*
Wireless Telecommunications Bureau
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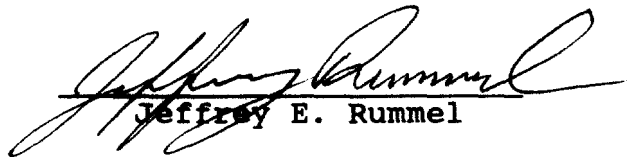
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Ellis Thompson Corporation


Jeffrey E. Rummel